Legal Risks to Employers Who Allow Smoking in the Workplace

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There is mounting evidence that documents the dangers of exposure to secondhand smoke, including in the workplace. In states that permit workplace smoking, employers face significant legal risks from employees who are exposed to secondhand smoke on the job. Employers have been held liable for employee exposure to secondhand smoke in numerous cases, including those based on workers' compensation, state and federal disability law, and the duty to provide a safe workplace. Given this liability risk, employers should voluntarily adopt smoke-free workplace policies. Such policies do more than fulfill an employer's legal obligation to provide a safe workplace; they also reduce the risk of litigation, potentially reduce workers' compensation premiums, and protect employees from harm. (*Am J Public Health.* 2007;97:1376–1382. doi: 10.2105/AJPH.2006.094102)

THERE IS MOUNTING evidence of the dangers of exposure to secondhand smoke. Several recent studies have shown that employees' exposure to secondhand smoke in the workplace causes significant increases in tobacco-specific carcinogens in the human body (M. Stark, PhD, unpublished data, April 2006).[1–6] Smoking in bars, restaurants, and other hospitality venues contributes substantially to poor indoor air quality in these workplaces and exposes employees to carcinogens and other toxic agents in tobacco smoke.[7] Specifically, nonsmokers who are exposed to secondhand smoke at work increase their risk of heart disease by 25%–30% and their risk of lung cancer by 20%–30%, and are susceptible to immediate damage to the cardiovascular system.[8] The only way to effectively eliminate secondhand smoke exposure in the workplace is to make the workplace a smoke-free environment.[9] Studies have shown immediate improvements in air quality[10,11] and workers' respiratory health[12] when smoking is eliminated from workplaces, including hospitality venues.

To protect employees and patrons from the dangers of exposure to secondhand smoke, many state and local governments have passed laws creating smoke-free workplaces, including restaurants and bars.[13] In states without smoke-free workplace laws, employers still face significant legal risks from employees who are exposed to secondhand smoke on the job. Employers can reduce these legal risks by voluntarily prohibiting smoking at their worksites.

SCIENTIFIC EVIDENCE AND SMOKE-FREE LAWS

Research conducted during the past several decades clearly documents that exposure to secondhand smoke causes death and disease in nonsmokers. Some research indicates that secondhand smoke is more toxic and potentially more dangerous than the smoke that is directly inhaled by the smoker.[14,15] Nationally, the US Environmental Protection Agency has found secondhand smoke to be a risk to public health and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen.[16] A recent report from the US surgeon general on the health consequences of involuntary exposure to tobacco smoke concluded that there is no safe level of exposure to secondhand smoke and neither separating smokers from nonsmokers nor installing ventilation systems effectively eliminates secondhand smoke.[9] In California, the state Air Resources Board declared secondhand smoke as a toxic air contaminant for which there is no known safe level of exposure.[17]

Additional research has focused on how exposure to secondhand smoke affects individual employees. For example, a major area of research has focused on biomarkers of secondhand smoke exposure in fluids such as urine and saliva. Several recent studies have shown that employees' exposure to secondhand smoke in the workplace causes significant increases in the uptake of tobacco-specific carcinogens.[1–6] In a national study of nonsmoking workers, exposure to secondhand smoke varied significantly by occupation.[5,18] Higher levels of exposure were observed in occupational groups that tend to be described as blue collar or service, such as waiters and bartenders, and lower levels in groups that tend to be described as white collar (e.g., office workers).[5]

Other studies have shown immediate improvements in air quality[10,11] and workers' respiratory health[12,19] when smoking is eliminated from hospitality venues. One such study monitored air quality in 7 different sites and documented an 80% reduction in indoor air pollution in venues that were required to be smoke free.[20] Policies that prohibit smoking in the workplace reduce exposure to secondhand smoke and significantly improve the health of employees.[21] In

particular, the national association that sets engineering standards for indoor air quality has found that adverse health effects for the occupants of a smoking room cannot be controlled by ventilation and that the only way to effectively eliminate health risk associated with indoor exposure is to ban smoking.[22]

Research that documents the dangers of exposure to secondhand smoke has helped propel state and local action creating smoke-free workplace laws. Since the 1970s, the nonsmokers' rights movement has made significant progress toward clean indoor air. As of April 2006, more than 2000 municipalities nationwide had implemented laws that restrict where smoking is allowed. Of these, 461 municipalities have a 100% smoke-free provision in effect at the local level—in workplaces, restaurants, bars, or all 3.[13] On the state level, 11 states have laws in effect that require 100% smoke-free workplaces, including restaurants and bars.[23]

Nonetheless, many workers remain unprotected. For example, in some areas, a state law may preempt stricter local regulation.[24] In addition, some jurisdictions—either on the state or local level—may lack sufficient political will to pass such laws, or efforts to do so may be blocked by tobacco industry lobbying.[25]

LEGAL RISKS

Workers who are not currently protected by state or local laws that create smoke-free workplaces nevertheless have legal options available. For example,

- an employee could file a workers' compensation claim against an employer for illness or injury attributable to exposure to secondhand smoke on the job. Such claims may increase an employer's workers' compensation premiums,
- an employee could file a disability discrimination claim that an employer failed to provide a "reasonable accommodation"—in this instance protection from exposure to secondhand smoke—if the worker has a disability (such as asthma) that is exacerbated by exposure to secondhand smoke, or
- an employee could file a claim that the employer failed to provide a safe workplace, based on a common law duty.

Employers may voluntarily adopt smoke-free workplace policies to reduce the threat of litigation in these areas. These 3 risks are examined in turn.

WORKERS' COMPENSATION

State workers' compensation laws are designed to protect workers from injuries and illnesses that arise out of and in the course of employment. The state laws are not based on fault; an injured worker can recover benefits, including compensation for temporary or permanent loss of income and medical expenses, without proving that the employer was negligent. A state administrative agency usually oversees the workers' compensation system so that employees may recover benefits promptly. In most cases, the state workers' compensation system prevents the employee from also suing the employer in tort.[26]

Premiums

States generally require employers to provide workers' compensation insurance to their employees by contracting with a private company, with a fund provided by the state, or by self-insuring.[26] An employer's workers' compensation premiums may increase because of claims filed because of workers' exposure to secondhand smoke on the job. Conversely, employers may be able to reduce their workers' compensation premiums by implementing safety policies, including smoke-free workplace policies, to reduce workplace illnesses and injuries.

Workers' compensation premiums for employers are rated according to past worker injury experience (also known as "experience rating").[27] This means that if a firm's injury history is better than average for a firm of its size and class, its premiums will be reduced. If the firm's injury history is worse than the average, its premiums will be increased.[27] Because experience rating gives individual employers some influence over the final premiums they pay, it provides an incentive for employers to prevent occupational injuries and illnesses.[27] Studies have shown that firms with aggressive safety programs often have lower workers' compensation costs than those that do not and that the reduction in these costs more than offsets the cost of safety initiatives.[28,29] Although only 15% of firms in the United States are experience rated, these firms employ approximately 90% of those who work.[30]

By contrast, some firms in the United States are so small that they are not experience rated. For those firms, premiums are determined by class insurance rates, a practice that is sometimes referred to as manual rating.[27] These rates are applicable to a specific industry or occupational group.[27] The premiums for these firms are not subject to change based on a particular company's injury history.

There is little research on the potential impact of secondhand smoke–related injuries on workers' compensation premiums. However, at least 1 insurance underwriter has noted that

> Studies have shown that employees who work in a smoke-filled environment suffer higher absenteeism and lower productivity, while such firms experience increasing health insurance rates and liability claims. Given that reality, you would think insureds would recognize the overall value of changing their policies to assure a safer, lawsuit-proof workplace.[31(p25)]

In addition, workplaces that have instituted smoking bans have seen a reduction in smoking prevalence, which also could lead to a reduction in premiums.[32]

Litigation Under Workers' Compensation Statutes

Employees have won in individual workers' compensation

cases involving secondhand smoke–related injuries when the employee suffered an asthmatic or allergic reaction as a result of exposure to secondhand smoke in the workplace and the employee had demonstrated exposure to a heavy concentration of secondhand smoke for several years.[33] Because the outcomes of workers' compensation cases have varied widely across states, an employee's ability to recover compensation will depend heavily upon the state in which the employer is located.

Asthmatic or Allergic Reactions

Employees have successfully asserted workers' compensation claims in which secondhand smoke caused an asthmatic or allergic reaction on the job. In 1 case, New York's Workers' Compensation Board awarded benefits to an employee who suffered asthma attacks at work as a result of exposure to secondhand smoke in a crowded office.[34] The board ruled that the employee had sustained an occupational injury as a result of the repeated exposure to smoke in the office.[34] There were many smokers in the vicinity of the employee's work station, and she had suffered 2 severe asthma attacks at work that required that she be taken to the emergency room.[34]

Similarly, a New Mexico court ruled that an employee's allergic reaction and collapse stemming from exposure to secondhand smoke at work constituted an accidental injury.[35] The employee claimed that constant exposure to cigarette smoke in the work environment triggered the allergies that, in turn, caused him to collapse.[35] The court stated that "the happenings may be gradual and may involve several different accidents which culminate in an accidental injury."[35(p284)]

Prolonged Exposure to Secondhand Smoke

In some instances, plaintiffs exposed to heavy concentrations of secondhand smoke in the workplace for extensive periods of time have been able to assert workers' compensation claims.[36] In a New Jersey case, the plaintiff shared an office with a chain-smoking coworker for 26 years and contracted tonsil cancer.[37] The plaintiff's secondhand smoke exposure at work was regular and long-standing, and he attempted to avoid smoke from every other source but his coworker.[37] A workers' compensation judge concluded that the plaintiff's tonsil cancer was a compensable occupational disease and ordered the employer to pay past and future medical expenses and temporary disability benefits.[37]

Although the New Jersey case is significant because the court recognized that secondhand smoke in the workplace can cause cancer, a review of workers' compensation cases shows that employees will be least likely to recover compensation in cases in which they suffer illnesses with long latency periods, such as cancer or lung disease. This is because of the possibility that the diseases could have been caused by a combination of secondhand smoke exposure on the job and factors outside of the workplace.[33,38–43]

As scientific evidence that supports the dangers of secondhand smoke exposure continues to mount, employees may be more likely to recover workers' compensation as courts are faced with increasing documentation of the actual harm to workers caused directly by exposure to secondhand smoke.

STATE AND FEDERAL DISABILITY LAWS

If an employee is considered "disabled" under state or federal disability laws and exposure to secondhand smoke exacerbates that disability, the employer may be required to make a "reasonable accommodation" to protect the employee from exposure to secondhand smoke.

In general, courts have held that an employee can be considered disabled under the Americans With Disabilities Act (ADA) or the federal Rehabilitation Act of 1973 (Rehab Act) if secondhand smoke substantially impairs the employee's ability to breathe and the impairment occurred both in and out of the workplace.[44–46] In determining whether an employer reasonably accommodated an employee's secondhand smoke–related disability, employees have prevailed where the employer made little or no effort to address the employee's request for a smoke-free workplace.

Disability

Determining whether an individual's condition legally qualifies as a disability is decided on a case-by-case basis.[47,48] In most instances, individuals bringing secondhand smoke–related lawsuits will claim that they are disabled under the ADA and the Rehab Act because they have a "physical or mental impairment that substantially limits" a "major life activity."[49]

Employees appear to have been most successful in ADA cases when they argued that secondhand smoke both on and off the job substantially limited their ability to breathe. Courts especially take note of whether the employee ever sought medical care, left work because of the condition, or continued to participate in activities of daily living.

For example, in *Service v. Union Pacific Railroad Company*, an employee had suffered several asthma attacks that required medical treatment while working in locomotive cabs in which coworkers had recently smoked.[44] The court rejected the employer's assertion that the employee's condition was temporary, noting that an employee "need not be in a constant state of distress or suffer an asthmatic attack to qualify as disabled under the ADA."[44(p1192)] The court "easily" found that genuine issues of material fact existed as to whether the employee's asthma substantially limited his major life activity of breathing.[44(p1192)]

However, in some cases, courts have found that employees were not able to qualify as disabled under federal disability laws. For example, in some cases, the court found that the employee's impairment was not

"substantial" if the employee's ability to breathe was not impaired both on and off the job.[50–52] Or, in some cases, courts have found that the employee did not qualify as substantially limited in the "major life activity" of working if the exposure to smoke impaired the employee's ability to work only in that particular job but not in a broad class of jobs.[50,52,53] Each case is evaluated by the court on the basis of the specific facts of the situation.

Also, courts must consider any factors that may mitigate the plaintiff's impairment, such as an inhaler or other medication.[54] However, the presence of mitigating measures does not mean that an individual is not covered by the ADA or Rehab Act. An individual still may be substantially limited in a major life activity, notwithstanding the use of a mitigating measure like medicine, which may only lessen the symptoms of an impairment.[54] For example, in *Service v. Union Pacific Railroad Company*, the court noted that the employee could not prevent his asthma attacks by using inhalers, and even when he used medicine, his asthma could not always be controlled.[44]

Reasonable Accommodations

In addition to disputing whether the employee can be classified as disabled, the second major area that is litigated in secondhand smoke cases brought under the ADA and Rehab Act is whether the employer's accommodations of the employee's impairment were reasonable. A reasonable accommodation includes "modifications or adjustments to the work environment . . . that would enable a qualified individual with a disability to perform the essential functions of that position."[55] An employer need not accommodate an employee if doing so would impose an "undue hardship,"[56] which is defined as "an action requiring significant difficulty or expense."[57]

Employees with secondhand smoke–related disabilities have prevailed on the issue of reasonable accommodation in cases in which the employer made little effort to address the employee's request for a smoke-free workplace. In *Service v. Union Pacific Railroad Company*, the court found that although the employer barred employees from smoking in the plaintiff's presence, it did nothing to accommodate the plaintiff's sensitivity to residual smoke.[44] The employer claimed that providing the employee with a smoke-free work environment would have constituted an undue hardship but offered no evidence of this.[44] In fact, studies have shown that smoke-free workplace policies and laws are inexpensive to implement and do not harm businesses that have implemented them.[58–60]

In cases in which the employer fails to make the reasonable accommodation requested under the ADA, a disabled employee may seek monetary damages, injunctive relief (a court order to prevent future harm), and attorneys' fees, with some exceptions.[61]

State Disability Rights Laws

A number of states have disability rights laws that provide broader protections than those found in the ADA and the Rehab Act. In New York, for example, state law does not require that an employee identify a major life activity substantially limited by his or her impairment to be categorized as disabled.[62] An individual may have a disability under New York law if the impairment is demonstrable by medically accepted techniques.[62] New Jersey law contains a similar provision.[63]

California's Fair Employment and Housing Act (FEHA) also provides broader protections than those provided under federal law.[64] For example, FEHA requires an impairment that limits a major life activity[64] rather than the ADA and Rehab Act requirement that an impairment substantially limits a major life activity.[49]

Sensitivity to secondhand smoke can constitute a disability under FEHA, and employers have been required to provide reasonable accommodations for employees with this disability.[65] In *County of Fresno v. Fair Employment and Housing Commission*, the employees demonstrated that because of respiratory disorders, exposure to tobacco smoke substantially limited their ability to breathe.[65] The court held that the employees were "physically handicapped within the meaning of [FEHA]."[65(p563)] The court then held that the employer's efforts to accommodate the employees were not reasonable.[65] The employer had placed smokers and nonsmokers at separate ends of the room, had asked smokers to be "considerate" of nonsmokers, and eventually moved the plaintiffs into an office adjacent to an office where employees smoked.[65] The court held that the county failed to make a reasonable accommodation because there was not a smoke-free environment in which the employees could work.[65]

As these cases illustrate, disability lawsuits can be an effective way for an individual who meets the legal definition of disabled to get relief from secondhand smoke exposure in the workplace. However, because the number of people who qualify for these federal protections is limited, disability lawsuits are not an ideal vehicle for advocates seeking workplace-smoking restrictions that protect a broad group of employees. Nonetheless, an accumulation of individual lawsuits could build a case for employers to voluntarily adopt smoke-free workplace policies in order to avoid future liability.

THE DUTY TO PROVIDE A SAFE WORKPLACE

In most jurisdictions, employers have a legal duty to provide employees a reasonably safe work environment.[66] This duty arises either from state law or from the common law, which refers to laws derived from court decisions rather than from laws or constitutions. Several courts have examined whether the employer's common law duty to

provide a safe workplace includes a duty to provide a working environment reasonably free from tobacco smoke.[67] Some courts have held that such a duty existed in instances in which plaintiff–employees complained to their employers regarding illnesses caused by workplace secondhand smoke and the employers had the ability to remedy the situation.[42]

Court decisions that find that employers breached their duty to provide a safe workplace share common elements (e.g., the employer knew that secondhand smoke was harmful to the plaintiff–employee; the employer had authority, ability, and reasonable means to control secondhand smoke; and the employer failed to take reasonable measures to control secondhand smoke.)

In *Shimp v Bell Telephone Co.*,[68] an employee who worked in an open area where other employees were permitted to smoke sought an injunction to require her employer to prohibit smoking in the area. The employee was severely allergic to tobacco smoke and was forced to leave work on several occasions after becoming physically ill because of exposure to secondhand smoke.[68] The court took judicial notice of the extensive evidence submitted by the employee of the health hazards that secondhand smoke poses to nonsmokers as a whole.[68] Relying on the employer's common law duty to provide a safe work environment, the court granted the injunction and ordered the employer to restrict the smoking of other employees to nonwork areas.[68] The court found that the injunction would not pose a hardship for the employer, because the company already had a rule barring employees from smoking around telephone equipment.[68]

Before arguing that an employer has breached the duty to provide a reasonably safe work environment, advocates should determine whether (1) the potential plaintiff informed the employer about the detrimental effects that secondhand smoke had on the employee's health, (2) the employer had the ability to implement reasonable restrictions on smoking in the workplace, and (3) the secondhand smoke in the employer's workplace was potentially harmful not only to the plaintiff but also to nonsmoking employees in general. Some courts have found no duty to provide a smoke-free workplace in cases in which individual employees failed to provide evidence of secondhand smoke's effects upon nonsmokers in general.[69]

However, since the 1976 decision in *Shimp v. Bell Telephone Co.*, decades of additional research on the effects of exposure to secondhand smoke has convincingly demonstrated the risk such exposure has for workers. In other cases decided more recently than *Shimp v. Bell Telephone Co.*, courts have agreed that employers can be found to have breached the duty to provide a safe workplace if they failed to maintain a smoke-free work environment.[43,70,71] The accumulation of evidence that documents the dangers of exposure to secondhand smoke should support plaintiffs in proving the potential harm of secondhand smoke exposure to all employees.

Advocates should note that, in most cases, the state workers' compensation system is the exclusive remedy for obtaining individual financial awards for job-related injuries and illnesses. In these states, employees should use the workers' compensation system to recover monetary damages for their injuries. However, if an employee is not seeking monetary damages but instead is seeking an injunction (e.g., a court order requiring a smoke-free workplace), the employee may pursue a claim on the basis of the common law duty to provide a safe workplace.[68,72] In addition, some state courts have ruled that workers' compensation laws do not provide coverage for injuries resulting from secondhand smoke in the workplace.[43] In those states, an employee may be able to pursue a claim based on the common law duty to provide a safe workplace and seek both monetary damages for the employee's injury and an injunction to prevent future harm.

CONCLUSION

Employers have been held liable for exposure of their employees to secondhand smoke on the job in numerous cases, including those based on workers' compensation, state and federal disability law, and the duty to provide a safe workplace. In addition, mounting scientific evidence that documents the dangers of exposure to secondhand smoke may increasingly persuade courts to assign liability to businesses that continue to allow workplace exposure to secondhand smoke. Given this liability risk, employers and insurance carriers should voluntarily adopt smoke-free workplace policies and support state or local legislation requiring smoke-free workplaces. Such policies not only will help fulfill an employer's legal obligation to provide a safe workplace and protect employees from harm but also make good business sense by potentially reducing workers' compensation premiums and reducing the risk of litigation. ■

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71. *Smith v W Elec Co*, 643 SW2d 10, 13 (Mo App 1982).

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